No. 87-5546

(4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONALD GENE FRANKLIN,
Petitioner

v.

JAMES A. LYNAUGH, Director,
Texas Department of Corrections,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 25, 1987
CERTIORARI GRANTED OCTOBER 9, 1987

40 p

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IN THE 197TH JUDICIAL DISTRICT COURT
CAMERON COUNTY, TEXAS

No. 82-CR-159-C

TEXAS

v.

FRANKLIN

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
3/8/82	Commencement of jury selection
3/15/82	Commencement of guilt/innocence phase
3/19/82	Petitioner convicted of capital murder
3/20/82	Commencement of punishment phase
	Filed Defendant's Special Requested Charges on Punishment Nos. One through Five.
	Held charge conference
	Petitioner sentenced to death by trial court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA-86-CA-608

FRANKLIN

v.

McCOTTER

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
4/9/86	Filed Application to Proceed In Forma Pauperis
	Filed Petition for Writ of Habeas Corpus
	Filed Application for Stay of Execution
4/14/86	Filed Respondent's Response to Petitioner's Request for Stay of Execution
4/30/86	Filed Respondent's Motion for Summary Judgment and Brief In Support
4/30/86	Held Evidentiary Hearing
6/6/86	Filed Magistrate's Recommendation that Petition for Writ of Habeas Corpus be denied and Stay of Execution vacated
6/16/86	Filed Petitioner's Objections to Magistrate's Recommendation
7/9/86	Filed Memorandum Opinion by United States District Judge
	Filed Order denying Petition for Writ of Habeas Corpus and vacating Stay of Execution

DATE	PROCEEDINGS
7/11/86	Filed Notice of Appeal
	Filed Application for Certificate of Probable Cause to Authorize Appeal and To Proceed on Appeal in Forma Pauperis
7/16/86	Filed Order Denying Application for Certificate of Probable Cause
	Filed Order Denying Application for Stay of Execution

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2538

FRANKLIN

v.

LYNAUGH

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
8/1/86	Filed Application for Certificate of Probable Cause to Authorize Appeal and for Leave to Proceed on Appeal In Forma Pauperis
8/1/86	Filed Application for Stay of Execution
8/13/86	Filed Respondent-Appellee's Opposition to Petitioner's Motion for Stay of Execution and Certificate of Probable Cause
9/12/86	Filed Order Granting Certificate of Probable Cause and Stay Execution
10/29/86	Filed Petitioner-Appellant's Brief
1/7/87	Filed Respondent-Appellee's Brief
3/17/87	Oral Argument
7/30/87	Opinion Rendered
8/21/87	Mandate Issued
9/23/87	Filed Application for Stay of Execution Pending Disposition of Petition for Writ of Certiorari
9/28/87	Filed Order Denying Application for Stay of Execution Pending Disposition of Petition for Writ of Certiorari

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

No. 82-CR-159-C

STATE OF TEXAS

vs.

DONALD GENE FRANKLIN

INDICTMENT

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The Grand Jury of Bexar County, State of Texas, duly organized, empaneled and sworn as such, at the January Term, A.D., 1980 of the 144th District Court of said County, in said Court, at said term, do present that in the County and State aforesaid, and anterior to the presentment of this indictment and on or about the 26TH day of JULY, A.D., 1975, DONALD GENE FRANKLIN did then and there knowingly and intentionally CAUSE THE DEATH OF AN INDIVIDUAL, NAMELY: MARY MARGARET MORAN, BY CUTTING AND STABBING THE SAID MARY MARGARET MORAN WITH A KNIFE, AND THE SAID DONALD GENE FRANKLIN DID THEN AND THERE INTENTIONALLY AND KNOWINGLY CAUSE THE DEATH OF MARY MARGARET MORAN IN THE COURSE OF COMMITTING AND ATTEMPTING TO COMMIT THE OFFENSE OF KIDNAPPING OF THE SAID MARY MARGARET MORAN;

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present in and to said Court that

on or about the 26TH day of JULY, A.D., 1975, and anterior to the presentment of this indictment, in the County of Bexar and State of Texas, DONALD GENE FRANKLIN did then and there INTENTIONALLY AND KNOWINGLY CAUSE THE DEATH OF AN INDIVIDUAL, NAMELY: MARY MARGARET MORAN, BY CUTTING AND STABBING THE SAID MARY MARGARET MORAN WITH A KNIFE, AND THE SAID DONALD GENE FRANKLIN DID THEN AND THERE INTENTIONALLY AND KNOWINGLY CAUSE THE DEATH OF MARY MARGARET MORAN IN THE COURSE OF COMMITTING AND ATTEMPTING TO COMMIT THE OFFENSE OF ROBBERY OF THE SAID MARY MARGARET MORAN;

/s/ Patsy R. Monfrey
Assist Foreman of the Grand Jury

The Following for District Clerk's Use Only

Offense: Capital Murder

Name: Donald Gene Franklin

Address: 203 Blue Bonnet

Grand Jury No. 117633

File No. 80 CR 0328

Witness: State's Attorney

[Filed Feb. 26, 1982]

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

(Title Omitted in Printing)

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. ONE

Filed: March 20, 1982

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW DONALD GENE FRANKLIN, defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty, including any aspect of the Defendant's character or record, and any of the circumstances of the commission of the offense which have been admitted in evidence before you, may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the Special Issues is 'Yes'; and in the event such evidence does so cause you to have such a reasonable doubt, you should answer the Issue 'No.'"

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151

The foregoing Defendant's Special Requested charge No. One is ————.

Judge Presiding

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

(Title Omitted in Printing)

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. TWO

Filed: March 20, 1982

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW DONALD GENE FRANKLIN, defendant in the above styled and numbered cause, and pursuant to Article 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that, in order to answer any of the Special Issues 'yes,' the Jury must believe unanimously, beyond a reasonable doubt, that the true answer to the Issue is 'Yes.' In order to answer any Issue 'No,' however, it is only necessary that ten of the jurors believe that the correct answer if 'No.' An answer of 'No' may be given to any of the Issues if:

"1) at least ten (10) jurors have a reasonable doubt as to whether or not the correct answer should be 'Yes'; or

"2) if at least ten (10) jurors find that mitigating factors against the imposition of the Death Penalty exist, either in regard to any aspect of the Defendant's character or record, or in regard to any of the circumstances of the commission of the offense which have been admitted in evidence before you; or

"3) if evidence of any such mitigating factors causes at least ten (10) jurors to have a reasonable doubt as to whether the true answer to the Issues is Yes.'"

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bldg.
San Antonio, Texas 78205
(512) 225-6151
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Two is ————.

Judge Presiding

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

(Title Omitted in Printing)

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. THREE

Filed March 20, 1982

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW DONALD GENE FRANKLIN, defendant in the above styled and numbered cause, and pursuant to Art. 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that you may answer any of the Special Issues 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
Suite 1010 Main Plaza Bl.
San Antonio, Texas 78205
(512) 225-6151
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Three is ————.

Judge Presiding

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

(Title Omitted in Printing)

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. FOUR

Filed March 20, 1982

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW DONALD GENE FRANKLIN, defendant in the above styled and numbered cause, and pursuant to Artiole 36.15, Code of Professional Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that you may answer Special Issue No. One 'No' if you find any aspect of the Defendant's character or record as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
1010 Main Plaza Building
San Antonio, Texas 78205
(512) 225-6151
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Four is ————.

Judge Presiding

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

(Title Omitted in Printing)

DEFENDANT'S SPECIAL REQUESTED CHARGE ON PUNISHMENT NO. FIVE

Filed March 20, 1982

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW DONALD GENE FRANKLIN, defendant in the above styled and numbered cause, and pursuant to Article 36.15, Code of Criminal Procedure, specially requests the Court, in its charge on punishment, to instruct the Jury as follows:

"You are instructed that you may answer Special Issue No. 2 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty."

Respectfully submitted,

/s/ Allen Cazier
ALLEN CAZIER
1010 Main Plaza Building
San Antonio, Texas 78205
(512) 225-6151
Attorney for Defendant

The foregoing Defendant's Special Requested Charge No. Five is ————.

Judge Presiding

IN THE DISTRICT COURT OF
CAMERON COUNTY, TEXAS
197TH JUDICIAL DISTRICT

(Title Omitted in Printing)

CHARGE OF THE COURT ON PUNISHMENT

LADIES AND GENTLEMEN OF THE JURY:

You have found the Defendant, Donald Gene Franklin, guilty of Capital Murder. It now becomes necessary that you answer for the Court certain questions in order that the Court may assess the punishment as provided by law in this case.

Please remember all the instructions that the Court has previously given you and be guided by them.

I am submitting to you two issues to be answered by you. You are instructed that the State must prove each issue submitted beyond a reasonable doubt, and you will return a special verdict of "yes" or "no" on each issue submitted to you.

You may not answer any issue "yes" unless you agree unanimously upon such an answer.

You may not answer any issue "no" unless ten or more jurors agree upon such an answer. If the Jury returns an affirmative finding on each issue here submitted, the Court will sentence the Defendant to death. If the Jury returns a negative finding on any issue here submitted, the Court will sentence the Defendant to confinement in the Texas Department of Corrections for life.

After you have reached a verdict your Foreman will certify thereto by signing the appropriate form attached to this charge.

FILED:

/s/ Tom Rickhoff
Judge Presiding

IN THE DISTRICT COURT OF
CAMERON COUNTY, TEXAS
197TH JUDICIAL DISTRICT

(Title Omitted in Printing)

Filed March 20, 1982

ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, Donald Gene Franklin, that caused the death of Mary Margaret Moran, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Answer "Yes" or "No".

We, the Jury, answer: YES

ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Donald Gene Franklin, would commit criminal acts of violence that would constitute a continuing threat to society?

Answer "Yes" or "No".

We, the Jury, answer: YES

CERTIFICATE OF ANSWER

We, the Jury, return in open Court the above answers as our answers to the issues submitted to us and the same is our verdict in the case.

/s/ Robert L. Moon
Foreman

IN THE DISTRICT COURT
197TH JUDICIAL DISTRICT
CAMERON COUNTY, TEXAS

(Title Omitted in Printing)

CHARGE CONFERENCE

[R.XIV—2953]

March 20, 1982

* * * *

(At the Bench out of the hearing of the jury)

THE COURT: All right. Are there—let me pass this to you and you tell me what objections you have to my Charge. I will keep the jury right here.

MR. HARRIS: State has no objection to the proposed Charge, nor do we have any requested additions.

MR. CAZIER: Your Honor has our request in writing. I understand it has made its ruling. We have no further objections to make

* * * *

IN THE DISTRICT COURT OF
CAMERON COUNTY, TEXAS
197TH JUDICIAL DISTRICT

(Title Omitted in Printing)

JUDGMENT OF CONVICTION

BE IT REMEMBERED that on the 8th day of March, 1982, this cause was called to trial and the State appeared by her Assistant Criminal District Attorney Bill Harris, Alan Battaglia and Mitch Weidenbach, and the defendant, Donald Gene Franklin appeared in person, his counsel by appointment, the Hon. Allan Cazier & Clarence Williams, also being present, and the defendant, having been duly arraigned, pleaded Not Guilty and both parties announced ready for trial; thereupon individual voir dire examinations of jury panel began and continued through March 13, 1982 until a jury of good and lawful persons, to wit: Robert Moon and eleven others, was duly selected, empaneled and sworn according to the law and charged by the Court on seperation; whereupon said cause was recessed until March 15, 1982.

THEREAFTER, on March 15, 1982 the indictment was read to the jury and the defendant entered his plea of Not Guilty thereto whereupon the State made the opening statements and proceeded to offer evidence through March 18, 1982, and rested.

WHEREUPON, the cause was recessed until March 18, 1982.

THEREAFTER, on March 18, 1982, defendant introduced evidence whereupon State offered no rebuttal evidence.

THEREAFTER, on March 19, 1982 the Court charged the jury as to the law applicable to said cause and argument of counsel for the State and the defendant was duly heard and concluded, and the jury retired in charge of the proper officer to consider their verdict, and afterward was brought into open court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open Court the following verdict, which was received by the Court and is here now entered upon the Minutes of the Court, to wit:

"We, the Jury, find the Defendant, Donald Gene Franklin, Guilty of Capital Murder as charged in the Indictment.

/s/ Robert L. Moon
Foreman

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the defendant, Donald Gene Franklin, is guilty of the offense of Capital Murder as found by the jury, and that said offense was committed on July 25, 1975.

WHEREUPON the cause was recessed until March, 20, 1982.

THEREAFTER, on March 20, 1982, the hearing on punishment began and both the State and the defendant offered evidence and rested. WHEREUPON the Court charged the jury with additional instructions as to the law applicable to punishment in said cause and the Jury retired to consider its verdict as to defendant's punishment, and thereafter returned into open court in charge of the proper officer to return the following verdict, which was received by the Court and is herenow entered upon the Minutes of the Court, to wit:

ISSUE NO. 1.

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Donald Gene

Franklin, that caused the death of Mary Margaret Moran, was committed deliberately and with reasonable expectation that the death of the deceased or another would result?

Answer "Yes" or "No".

We, the Jury, answer: *Yes*

ISSUE NO. 2.

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Donald Gene Franklin, would commit criminal acts of violence that would constitute a continuing threat to society?

Answer "Yes" or "No".

We, the Jury, answer: *Yes*

CERTIFICATE OF ANSWER

"We, the Jury, return in open Court the above answers as our answers to the issues submitted to us and the same is our verdict in the case."

/s/ Robert L. Moon
Foreman

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendant Donald Gene Franklin, is guilty of the offense of Capital Murder, as found by the Jury, and that he be punished, by reason of the answer made by the Jury to the Special Issues submitted, by *DEATH*.

SIGNED AND ORDERED ENTERED THIS 29 DAY OF March, 1982.

/s/ Tom Rickhoff
TOM RICKHOFF
Judge Presiding

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SA-86-CA-608

DONALD GENE FRANKLIN,
Petitioner

vs.

O.L. MCCOTTER, Director
Texas Department of Corrections,
Respondent

Filed July 9, 1986

MEMORANDUM OPINION

On this day came on to be considered petitioner's application for writ of habeas corpus, filed pursuant to 28 U.S.C. Section 2254. The application was referred to United States Magistrate Jamie C. Boyd to conduct an evidentiary hearing, to review state court records and to submit proposed findings of fact and conclusions of law and a recommendation for disposition to this Court. Magistrate Boyd concluded that petitioner was not entitled to relief, and that the application should be denied. Petitioner has timely objected to the report. This Court has conducted a de novo review by reading and considering the pleadings, the transcript of the evidentiary hearing, the state court records, and the applicable law. Having done so, it is the opinion of this Court that the recommendation should be adopted. Petitioner's claims A,

E, F, G, H, I, J, and K were adequately addressed by Magistrate Boyd, lack merit, and need not be discussed again.

In claim C, petitioner contends that the state trial court erred in failing to include in its jury charge, instructions regarding the jury's consideration of mitigating evidence. In *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that a death penalty statute which does not permit the sentencer to consider mitigating factors, violates the Eighth and Fourteenth Amendments. The current Texas death penalty law, Article 37.071 of the Texas Code of Criminal Procedure, was upheld in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The Supreme Court, after noting that the Texas statute does not explicitly speak of mitigating circumstances, found that it did permit the jury to consider whatever evidence of mitigating circumstances the defense wishes to introduce. *Id.* at 272-73, 99 S.Ct. at 2956-57. Although the decision in *Jurek* preceded that in *Lockett*, it is clear that Article 37.071 complies with the requirement of *Lockett*. The Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances. *Zant v. Stephens*, 462 U.S. 862, 890, 103 S.Ct. 2733, 2750, 77 L.Ed.2d 235 (1983). The failure to so instruct the jury in this case was not error. *See, Esquivel v. McCotter*, 777 F.2d 956 (5th Cir. 1985). Since there was no error, petitioner's appellate counsel could not be ineffective for failing to raise that issue on appeal.

Petitioner also challenges the state trial court's order overruling his motion to suppress evidence. He sought to suppress various items of incriminating evidence seized from his home and car after he signed a consent-to-search form. The State contends and the Magistrate found that consideration of this issue by this Court is foreclosed by *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). In *Stone* the Supreme Court held that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. *Id.* at 494, 96 S.Ct. at 3052. The Fifth Circuit has interpreted "full and fair" consideration to include at least one evidentiary hearing in a trial court, and the availability of meaningful appellate review when there are facts in dispute, and full consideration by an appellate court when the facts are not in dispute. *O'Berry v. Wainwright*, 546 F.2d 1204, 1213 (5th Cir. 1977). If a State provides the processes whereby a defendant can obtain full and fair litigation of a Fourth Amendment claim, *Stone v. Powell* bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes. *Caver v. State of Alabama*, 577 F.2d 1188, 1192 (5th Cir. 1978). *See, Christian v. McCaskle*, 731 F.2d 1196, 1199 n.1 (5th Cir. 1984). In the absence of allegations that the processes are routinely or systematically applied in such a way as to prevent the actual litigation of Fourth Amendment claims, federal review is precluded. *Williams v. Brown*, 609 F.2d 216, 220 (5th Cir. 1980). Petitioner has made no such contentions.

Twice the motion to suppress was heard and overruled. Prior to the first trial and then prior to the third trial, evidence was presented on the Fourth Amendment claim. Petitioner had every opportunity to cross-examine the State's witnesses, to challenge the State's exhibits, to present his evidence, and to argue his position. At the second hearing, the trial judge made several relevant inquiries of the witnesses and stated that he had read the cases pertinent to the suppression issue. In neither his first appeal (*Franklin v. State*, 606 S.W.2d 818 (Tex. Crim. App. 1978)) nor his third appeal (*Franklin v.*

State, 693 S.W.2d 420 (Tex. Crim. App. 1985)) did petitioner challenge the trial court's rulings, despite the opportunity to do so. Not until April 3, 1986, in his state application for writ of habeas corpus, did he present the Fourth Amendment claim to the Texas Court of Criminal Appeals, which denied it. The application had previously been denied by the trial court which held that the issue was not cognizable in a post-conviction habeas corpus proceeding. Petitioner asserts that ineffective assistance of his appellate counsel, an issue to be discussed below, in failing to raise the Fourth Amendment claim on direct appeal, precluded him from having an opportunity for full and fair litigation. This Court believes that, while this failure can be reviewed under the Sixth Amendment, it does not affect the application of *Stone v. Powell*. Having read the transcripts of the state court suppression hearings, this Court is firmly convinced that petitioner's motion hinged exclusively on disputed facts. Petitioner received full and fair litigation of his suppression claim in state trial court and had the availability of meaningful appellate review; federal habeas corpus cannot lie. *See, O'Berry v. Wainwright*, 546 F.2d at 1213.

In the final point to be addressed, petitioner contends he was denied the effective assistance of counsel on appeal because of counsel's failure to raise the Fourth Amendment issue. Until recently, whether *Stone v. Powell* precluded a Sixth Amendment claim such as this was undecided. *Lockhart v. McCotter*, 782 F.2d 1275, 1279 n.7 (5th Cir. 1986). In *Kimmelman v. Morrison*, 54 U.S.L.W. 4789, decided June 26, 1986, the United States Supreme Court held that federal habeas relief is available in such situations. Examination of the claim is, therefore, appropriate, since petitioner has a right to the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. ——, ——, 105 S.Ct. 830, 836-37, 83 L.Ed.2d 821 (1985).

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court established a two-pronged test for determining the effectiveness of counsel's performance. The defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. 104 S.Ct. at 2064. In determining whether counsel's performance was deficient, the relevant inquiry is whether counsel's representation fell below an objective standard of reasonableness according to prevailing professional standards. *Id.* at 2065. The reviewing court must give great deference to counsel's assistance, strongly presuming that counsel has exercised reasonable professional judgment. *Lockhart v. McCotter*, 782 F.2d at 1279.

At the evidentiary hearing before Magistrate Boyd, testimony was elicited that petitioner's appellate counsel was deficient in failing to appeal the suppression issue. Allen Cazier, trial counsel for petitioner at the third trial, testified that whether petitioner voluntarily consented to the search of his house and car was the "most significant issue" in terms of his defense. Cazier discussed the search issue with David Chapman, petitioner's appellate counsel, and encouraged him to raise it. Gerald Goldstein, a highly competent and respected criminal defense lawyer, testified that in a capital murder case, appellate counsel should raise arguable claims, which Goldstein believed, from reading petitioner's application for writ of habeas corpus, encompassed the Fourth Amendment claim here. David Weiner, an experienced criminal appeals lawyer, echoed this belief.

In *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), the Supreme Court held that a defendant has no constitutional right to compel appointed counsel to press non-frivolous points on appeal. The appellate advocate must be allowed to examine the record

with a view to selecting the most promising issues for review. *Id.* at 752, 103 S.Ct. at 3313.

> "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies *Anders* [*v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)]. *Id.* at 754, 103 S.Ct. at 3314.

This Court perceives no distinction between "arguable" and "colorable" claims. The belief that appellate counsel should raise all arguable claims dose not comport with *Jones. See, Evitts v. Lucey*, 105 S.Ct. at 835.

The testimony of Chapman establishes his reasons for choosing not to raise the suppression issue. He spent approximately ninety hours on the appeal. He researched and investigated the search and seizure issue, and took extensive notes from the record. Chapman believed that, for petitioner to prevail on appeal, the Texas Court of Criminal Appeals would have to find that the testimony of the police officers was false. He did not believe the appellate court would second-guess the credibility choices of the trial courts. As mentioned above, petitioner's motion presented credibility choices almost exclusively. As noted by Goldstein and Weiner, such situations make reversal more difficult because of the stringent standard for review. Chapman believed that the search question was not meritorious, and had virtually no chance of success. The testimony of Goldstein and Weiner to the contrary, which was based solely upon a reading of petitioner's application for writ of habeas corpus, and not upon a review of the state court briefs or transcripts, is unpersuasive. Chapman chose not to present the issue because it would diminish his credibility and detract from the grounds of error he believed did have merit. *See, Jones v. Barnes*, at 753, 103 S.Ct. at 3313. Chapman's research and investigation and his decision to raise only those points he believed had some plausible merit, represents the kind of strategy that able counsel pursue and appellate courts appreciate. *See, Wicken v. McCotter*, 783 F.2d 487, 497 (5th Cir. 1986). His representation of petitioner on appeal was not deficient.

While this finding is sufficient to justify denial of the ineffective assistance claim, the Court feels it appropriate, because this is a death penalty case, to also discuss its belief that petitioner suffered no prejudice from the failure to appeal the Fourth Amendment claim. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* In this case, petitioner would have to establish a meritorious Fourth Amendment claim resulting in suppression of the incriminating evidence.

In his federal habeas corpus application, petitioner contends that he did not voluntarily consent to the search of his home and car. The application states that he was told by a police officer that if he did not consent, a search warrant would be obtained. Petitioner also clai ns he was under arrest at the time the consent was given, and that many police officers had their weapons drawn. He further contends that the arrest was illegal and tainted the subsequent consent. The allegation of a warrant threat is baseless, since petitioner, at the first suppression hearing, denied that the officer told him he would obtain a warrant if petitioner did not consent. (S.F.-I, p. 506). Such a statement could not, therefore, have been a factor in his decision to consent. As for the illegal arrest issue, it was never presented to the trial courts. While the motion to suppress was based on the volun-

tariness vel non of the consent, neither the brief nor the evidence was directed to the legality of the arrest and its effect on the consent. Because of this, there is little proof of the existence or lack of probable cause to arrest. The trial courts were never given the opportunity to rule on this precise issue, and it cannot, therefore, be considered now. *See, United States v. Hicks*, 524 F.2d 1001, 1004 (5th Cir. 1975), *cert. denied*, 424 U.S. 946 (1976). *Writt v. State*, 541 S.W.2d 424, 426 (Tex. Crim. App. 1976). In any event, the evidence on petitioner's arrest status was conflicting. Whether petitioner was under arrest and/or warned of his constitutional rights prior to consen. g were matters bearing on consent which the trial courts could consider. Some testimony indicated that the consent form was signed before he was arrested (S.F.-I, pgs. 459, 474, 476), while other evidence suggests he was arrested prior to consenting. (S.F.-I, p. 372; S.F.-III, p. 153). The trial courts were entitled to believe either scenario.

In determining whether consent was knowingly and voluntarily given, courts must analyze the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). *United States v. Davis*, 749 F.2d 292, 294 (5th Cir. 1985). At the first suppression hearing in December, 1975, petitioner was the only witness for the defense who was present at the scene. He testified he was jerked out of his door and pushed against a wall. (S.F.-I, p. 476). He also stated he was presented with a search warrant for his house which he was told to sign. (S.F.-I, p. 475). Because of the guns which were drawn and pointed at him, he feared for his safety and signed. (S.F.-I, p. 477). At the second suppression hearing in January, 1982, petitioner's stepfather, mother and common law wife testified that the officer's weapons were drawn and that petitioner was physically mistreated and told to sign the consent form. (S.F.-III, pgs. 90-92, 112-113, 125).

This Court believes, as did the state trial courts, that the defense version of the events lack credibility. Petitioner's previous rape conviction and his obvious keen personal interest in the outcome of the suppression hearing detract from the credibility. Not until the second hearing did petitioner's other eyewitnesses testify. Statements given by his stepfather and wife the day after the arrest do not mention that he was pulled out of the door into the yard full of police officers with drawn guns. (S.F.-III, pgs. 101, 129). The stepfather's statement indicates petitioner consented of his own choosing. (S.F.-III, p. 100). Several officers testified petitioner was not jerked or pulled from his house, and that guns were not drawn. (S.F.-III, pgs. 153-154, 183, 213, 215, 222-223, 242, 261, 266). He was asked to sign and told he did not have to sign. (S.F.-I, p. 395; S.F.-III, pgs. 153, 224). He was not forced, threatened or coerced into signing. (S.F.-III, pgs. 155, 182, 266). Petitioner never indicated he did not want to consent. (S.F.-I, pgs. 377, 416, 428-429). He read and understood the consent form, signed it and told the officers he had nothing to hide. (S.F.-I, pgs. 334, 373-374; S.F.-III, pgs. 118, 224). The motion to suppress was properly overruled, precluding the necessary showing that appellate counsel's failure to appeal the ruling prejudiced petitioner. His ineffective assistance of counsel claim is without merit and his application for writ of habeas corpus shall be denied.

SIGNED this 9th day of July, 1986.

/s/ H.F. Garcia
H.F. GARCIA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Title Omitted in Printing)

JUDGMENT

In accordance with the Memorandum Opinion being entered contemporaneously herewith;

It is ORDERED that petitioner's application for writ of habeas corpus is DENIED. The stay of execution granted herein on April 11, 1986 is hereby VACATED.

SIGNED this 9th day of July, 1986.

/s/ H.F. Garcia
H.F. GARCIA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

(Title Omitted in Printing)

ORDER

On this day came on to be considered petitioner's application for a stay of execution pending appeal. Contemporaneously herewith the Court has denied petitioner's application for a certificate of probable cause. For the reasons stated therein, the application for stay shall be denied.

It is, therefore, ORDERED that petitioner's application for a stay of execution is DENIED.

SIGNED this 15th day of July, 1986.

/s/ H.F. Garcia
H.F. GARCIA
United States District Judge

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 86-2538, 86-2883

DONALD GENE FRANKLIN,
Petitioner-Appellant,

v.

JAMES A. LYNAUGH, Interim Director,
Texas Department of Corrections,
Respondent-Appellee.

July 30, 1987

Appeals from the United States District Court for
the Western District of Texas

Before GEE, RANDALL, and DAVIS, Circuit Judges.

PER CURIAM:

There is small occasion for us to rehearse the sickening facts of this murder, one in which an innocent victim who stepped into the wrong place at the wrong time was stabbed, raped and left to bleed to death for five days in the July sun of Texas. These are set forth at length in the various opinions on direct appeal, *e.g.*, 606 S.W.2d 818 (Tex. Crim. App. 1979). Nor need much be said on the law, it having developed and set against petitioner's contentions over the course of the twelve years

since his crime. We affirm the trial court's judgment denying habeas relief on the basis of that court's opinions, adding a few observations chiefly based on events occurring since that court ruled.

Of petitioner's points, the most nearly meritorious is that complaining of an improper reference to petitioner's post-arrest silence after he had received *Miranda* warnings. Since the handing down of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), comments by the prosecutor on the post-arrest silence of a defendant after the administration of *Miranda* warnings have been taboo. The Supreme Court has now held, however, that such a question as the prosecutor asked in this case does not require a grant of habeas relief where no *use* of the fact of petitioner's silence is permitted by the court. *Greer v. Miller*, —— U.S. ——, 107 S.Ct. 3102, 95 L.Ed.2d ——, 55 U.S.L.W. 5126 (1987). Here there was none; a sustained objection and an instruction to disregard followed hard on the improper question. It was never heard of again. *Greer* is on all fours; it controls.

The next most troubling was a statistics-based claim that the Texas murder statute is applied in a discriminatory way against blacks who murder whites. Petitioner's claims in this respect have been resolved against him by the Court's opinion in *McCleskey v. Kemp*, —— U.S. ——, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

Finally, we were concerned by petitioner's contention that the wording of the trial court's charge was such as to have permitted the jury to have convicted petitioner of capital murder for a killing committed in the course of a felony, when some jurors may have believed that the felony was robbery, while others thought it kidnapping.[1] While, on the words of the court's charge

[1] The portion of the charge in question authorized conviction on a finding of murder . . . in the course of committing and attempting to commit the offense of robbery *or* kidnapping (emphasis supplied).

standing alone, this may seem a realistic objection, when the record is consulted, it is not. On the evidence, there was little serious dispute that whoever attacked the victim both robbed and kidnapped her. Petitioner's defense disputed these matters only pro forma; his major claim was that he was not the perpetrator of the crime, that his indictment was the result of mistaken identity. The evidence supporting the commission of both felonies was crushing, unanswerable; the only question was, who did them? In these circumstances, the claim that some jurors may have thought Franklin only a kidnapper while others thought him only a robber lacks any substance whatever, despite its abstract plausibility. The jury faced only one real question: whoever did this thing did both robbery and kidnapping, but was it Franklin?

The jury found that it was. For whatever it adds, we agree. The stay of execution earlier granted is VACATED, and judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 86-2538 and 86-2883

(Title Omitted in Printing)

Appeals from the United States District Court for the Western District of Texas

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Filed September 28, 1987

Before GEE, RANDALL and DAVIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's application for stay of execution pending disposition of petition for writ of certiorari is DENIED.

IN THE SUPREME COURT
OF THE UNITED STATES

87-5546
(A-251)

FRANKLIN, DONALD G.

v.

LYNAUGH, DIR., TEXAS DOC

September 30, 1987

The application for stay of execution of sentence of death, presented to Justice White and by him referred to the Court, is granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

SUPREME COURT OF THE UNITED STATES

No. 87-5546

DONALD GENE FRANKLIN,
Petitioner,

v.

JAMES A. LYNAUGH, Director,
Texas Department of Corrections

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is order by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 9, 1987